IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO.1118 OF 2005
IN
NOTICE OF MOTION NO.2808 OF 2002
IN
SUIT NO.3323 OF 2002

Medley Pharmaceuticals Ltd. .. Appellant

v/s.

Khandelwal Laboratories Ltd. .. Respondent

Dr.Virendra Tulzapurkar, Senior Counsel i/by Mr.H.W.Kane for the appellant.

Mr.I.M.Chhagla with Mr.A.S.Kamat i/by M/s.Bharat Shah & Co. for the respondent.

CORAM : R.M.LODHA AND D.G.KARNIK, JJ.

DATED : 22nd December, 2005

P.C.

Heard Dr.Virendra Tulzapurkar, the learned senior counsel for the appellant.

2. The appellant is the original plaintiff. The notice of motion taken out by the plaintiff for interim relief came to be rejected. Hence the appeal.

3. The plaintiff claims to be the owner of trade mark CEFO, CEFO-P and CEFO-DT. The grievance of the plaintiff is that the defendant has been manufacturing and selling the pharmaceutical and medicinal preparations under the mark CEFI or CEFI-DT which are deceptively similar to the plaintiff's trade mark and amount to an act of passing off their goods as that of plaintiff.

4. The learned motion Judge dismissed the notice of motion on the ground that the plaintiff has not acquired any distinctive mark in CEFO for its use in relation to medicinal and pharmaceutical preparation. While holding so, the learned motion Judge noticed that there are already lots many pharmaceutical preparations/medicines using the mark CEFTAS, CEFSPAN, CEFIX, CEFF, CEFLIN, CAFOGEN. The learned Single Judge accordingly, held that the plaintiff cannot be said to have any exclusivity or a right of exclusive in using of said mark.

5. The consideration of the matter by the learned motion Judge cannot be said to suffer from any error of law or fact. At page 92, there is a list of Cefixime preparations available in the market having marks ‘CEFIX’, ‘CEFOCEF’, ‘CEFTAS’, ‘CEFSPAN’ besides the defendant’s product CEFI. All these marks are derived from chemical bound cefixime. The sale of these products is in million of rupees. The finding of the learned motion Judge that plaintiff failed to establish distinctiveness of his mark, therefore, cannot be said to suffer from infirmity.

6. Assuming that the plaintiff has acquired the distinctiveness and established exclusivity of his mark CEFO, yet we find that there is no phonetic similarity between the two trade marks CEFO and

CEFI. Even if we hold for the argument's sake that the defendant's mark is similar or nearer to the plaintiff's mark, phonetically as well as alphabetically, then also it is apparent from the various marks referred above that all such marks can co-exist without causing any deception or confusion.

7. For all these reasons, we are not inclined to entertain the appeal. Appeal is dismissed in limine.

(R.M. LODHA, J.)

(D.G. KARNIK, J.)